Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

KOHLER CO., *Petitioner*

v.

LOCAL 833, UAW-AFL-CIO INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

and

NATIONAL LABOR RELATIONS BOARD, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Kohler Co., prays that a writ of certiorari issue to review an order of the United States Court of Appeals for the District of Columbia Circuit in the above-entitled case. That order denied the motion of petitioner to transfer the case to the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

No opinion was rendered by the Court of Appeals. The Decision and Order of the National Labor Relations Board, which are the subject of these review proceedings, are reported in 128 NLRB No. 122.

JURISDICTION

The order of the Court of Appeals was entered on November 23, 1960 (Appendix A, p. 1a). A petition for rehearing, *en banc*, was denied on January 9, 1961 (Appendix A, p. [illegible]). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Whether 28 U.S.C. § 2112 (a) and 29 U.S.C. § 160 (f) can be so construed as to permit, in proceedings for the review and enforcement of a National Labor Relations Board order, the denial of a motion by the Company against whom the order runs to transfer the cause to the circuit wherein all of the parties reside, the alleged unfair labor practices occurred, related causes have been litigated and the Company has filed a petition for review of the order.

STATUTES INVOLVED

29 U.S.C. § 160 (e):

> The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or re-

straining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to

review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

29 U.S.C. § 160 (f):

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

28 U.S.C. § 2112 (a):

The several courts of appeals shall have power to adopt, with the approval of the Judicial Con-

ference of the United States, rules, which so far as practicable shall be uniform in all such courts prescribing the time and manner of filing and the contents of the record in all proceedings instituted in the courts of appeals to enjoin, set aside, suspend, modify, or otherwise review or enforce orders of administrative agencies, boards, commissions, and officers, to the extent that the applicable statute does not specifically prescribe such time or manner of filing or contents of the record. Such rules may authorize the agency, board, commission, or officer to file in the court a certified list of the materials comprising the record and retain and hold for the court all such materials and transmit the same or any part thereof to the court, when and as required by it, at any time prior to the final determination of the proceeding, and such filing of such certified list of the materials comprising the record and such subsequent transmittal of any such materials when and as required shall be deemed full compliance with any provision of law requiring the filing of the record in the court. The record in such proceedings shall be certified and filed in or held for and transmitted to the court of appeals by the agency, board, commission, or officer concerned within the time and in the manner prescribed by such rules. If proceedings have been instituted in two or more courts of appeals with respect to the same order the agency, board, commission, or officer concerned shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted. The other courts in which such proceedings are pending shall thereupon transfer them to the court of appeals in which the record has been filed. For the convenience of the parties in the interest of justice such court may thereafter transfer all the proceedings with respect to such order to any other court of appeals.

STATEMENT OF THE CASE

At 10:30 a.m., EDT, August 26, 1960, the National Labor Relations Board issued its final order in Case No. 13-CA-1780, *Kohler Co. and Local 833, UAW-AFL-CIO, et al.* Five minutes later, at 10:35 a.m., EDT, on August 26, 1960, a petition to review the Board's order was filed in the United States Court of Appeals for the District of Columbia Circuit by Local 833, UAW-AFL-CIO, which had been the Charging Party in the proceedings before the NLRB. (App. A p. 2a) Somewhat later on the same day Kohler Co., the Respondent before the Board, filed in the Court of Appeals for the Seventh Circuit a petition to review the Board's order. (App. B, p. 11a).

On October 12, 1960 the NLRB filed in the District of Columbia Circuit the certified record of the proceedings before the Board and a petition to enforce its order against the Company. The Board stated in its petition for enforcement that it read 28 U.S.C. § 2112 (a) to require it to file these documents in the District of Columbia Court rather than in the Seventh Circuit. (App. A, pp. 5a, 8a)

The petition of the Union for review and the petition of the Board for enforcement were thereafter consolidated (App. A, p. 10a). Kohler Co. then moved to transfer the consolidated proceeding to the Seventh Circuit. The Union opposed the motion. The Board took no position but advised the Court, in substance, that it would have filed its petition for enforcement in the Seventh Circuit except for the pendency of the Union's petition in the District of Columbia Court. On November 23, 1960 the Court of Appeals denied the motion to transfer. The Company moved promptly

for reconsideration *en banc* and that motion was denied on January 9, 1961. (App. A, p. 10a).

In the meantime the NLRB had filed a motion in the Seventh Circuit seeking to transfer the Company's petition for review from that Court to the D. C. Circuit. The Board took the position in its motion that the Seventh Circuit was required by 28 U.S.C. § 2112 (a) to transfer the case to the D. C. Circuit so that the latter Court could make the preliminary determination envisioned by 28 U.S.C. § 2112 (a). On January 18, 1961, over the objection of the Company and after denial by the D. C. Circuit of the petition for rehearing *en banc* of the motion to transfer, the Seventh Circuit granted the Board's motion and transferred the Company's petition for review to the District of Columbia Circuit. (App. B, p. 16a).

As noted previously, the Company was the sole respondent in the proceedings before the Board. The Union was the Charging Party. In consequence, the Board's final order ran only against the Company. It directed the Company to bargain in good faith with the Union, upon application to offer immediate reinstatement to certain striking employees, and to take certain other affirmative action. The Company was also ordered to cease and desist from violating Section 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended (29 U.S.C. § 158 (a) (1), (3) and (5)). 128 NLRB No. 122

The Board declined to find, however, that the Company had violated the Act in certain of the respects charged,—including the discharge for misconduct during the strike of some 77 former employees.

Thus, the Board's order was in certain respects adverse to the Company and in others adverse to the Union. The Union's petition for review, filed in the District of Columbia Circuit, sought review of those portions of the order adverse to its interests, while the Company's petition to the Seventh Circuit sought review of those portions adverse to its interests. In accordance with the provisions of Sections 10 (f) of the NLRA, as amended (29 U.S.C. § 160 (f)), the sole respondent named in each of the petitions for review was the National Labor Relations Board.

The Board's petition to the D. C. Circuit for enforcement of its order was allegedly filed under Section 10(e) of the NLRA, as amended (29 U.S.C. § 160 (e)). It related only to those portions of the Board's decision and order which ran against the Company and it named the Company alone as respondent. (App. A, p. 5a).

REASONS FOR GRANTING THE WRIT

The order of the District of Columbia Circuit denying transfer to the Seventh Circuit involves an important question in the administration of the review and enforcement provisions of the National Labor Relations Act, as amended, which question has not been, but should be, settled by this Court. In addition, the case presents for decision an issue that has produced an apparent conflict within the District of Columbia Circuit which that Court has failed to resolve.

(a) The Importance of the Question

The *Kohler* case is the third one within the past six months to present to the District of Columbia

Circuit the question of the appropriate Court of Appeals to entertain proceedings to review NLRB orders.[1] The three cases have such marked similarities as to suggest that a specific procedural technique has been developed for dealing with review of NLRB cases. In each instance a union which was the Charging Party in proceedings before the Board has outsped a respondent employer in a race to the courthouse to lodge a 10 (f) petition for review. Thus, the petitioning union succeeds in selecting the District of Columbia Circuit as the Court to make the initial 2112 (a) determination. It is then argued to the District of Columbia Court that the language of Section 10 (f) of the NLRA provides for alternative jurisdiction in that Court to review NLRB orders which is not subject to the *forum non conveniens* considerations that apply to all other Courts of Appeals under 2112 (a).[2] It is believed that this argument has been accepted by the Court of Appeals and that its acceptance underlies the denial of the Kohler Motion to Transfer to the Seventh Circuit.

Because of the Labor Board's practice of releasing decisions from its headquarters and because of the location of those headquarters in the District of Colum-

[1] The three cases are Butcher Boy Refrigerator Door Co., Cases Nos. 15,849 and 15,885; Gulf Bottlers Co., Cases Nos. 15,754 and 15,929; and Kohler Co., Cases Nos. 15,961 and 16,031. In both Gulf Bottlers and Kohler the employer's motion to transfer was denied as was a petition for rehearing *en banc*. Motion to transfer was granted in Butcher Boy. No rehearing was sought.

[2] Significantly, this argument does not appear to have been made by the union in the *Butcher Boy Refrigerator Door* case. This appears to be the only ground on which the allowance of the motion to transfer in that case can be reconciled with the denials in the *Gulf Bottlers* and *Kohler* cases.

bia, a petition for review of an NLRB order can usually be lodged with the D. C. Circuit before a similar document can be filed in any other circuit. Thus, persons desiring to vest the District of Columbia Circuit with 2112 (a) jurisdiction normally have it in their power to do so. For that reason the criteria applied by the D. C. Circuit in making 2112 (a) determinations become of great importance in the administration of the NLRA. By the same token, the development in that Circuit of a rule of law for the application of 2112 (a), which, we submit, is erroneous, presents a question of major importance in the administration of the NLRA that justifies review and correction by this Court.

(b) The Construction of 28 U.S.C. § 2112(a) by the Court of Appeals Is Probably Erroneous

Since the Court of Appeals rendered no opinion, it is necessary to consider each possible ground of decision. They are believed to be two. First, the Court may have concluded that, on balance, the convenience of the parties and the interest of justice dictated that the case should be retained in the District of Columbia. Second, the Court may have considered that transfer should be denied because Congress intended that persons aggrieved by NLRB orders should have a right of review in the District of Columbia Circuit irrespective of the convenience of the parties and the interest of justice.[3] It is submitted that neither ground can sustain the decision.

[3] A third ground of decision was tendered to the Court of Appeals by the Union; it was charged that the Company was "forum shopping" in seeking transfer to its home circuit, the Seventh. We do not treat the argument separately here because we believe it to be frivolous when measured against the facts disclosed by this record.

The only "convenience" suggested to the Court of Appeals as a basis for retaining the case in the District of Columbia arose from the fact that principal appellate counsel for the Union reside and practice here, as do associated counsel for the Company and the Associate General Counsel of the Board who has general supervision over proceedings to enforce NLRB orders. All other relevant contacts with the case lie in the Seventh Circuit; the Union and the Company reside there; the employees involved both work and reside there; the alleged unfair labor practices occurred there; any Company compliance with a Board order or decree must take place, and be supervised,[4] there; principal counsel for the Company resides and practices there; and, counsel who represented the Union before the NLRB reside and practice there. Thus, the balance of the convenience of the parties and the interest of justice seems heavily weighted in favor of transfer to the Seventh Circuit. Indeed, so heavily do the scales preponderate in favor of that result that we do not believe that the decision of the Court of Appeals rests on an appraisal of the *forum non conveniens* factors. If, however, we are wrong in this assumption, then the decision of the Court of Appeals presents a truly grave question in the administration of Section

[4] We do not imply that the Company would resist a court decree. On the contrary, the Company is now voluntarily complying with certain portions of the Board's order. However, the case is an exceptionally multifarious one. The transcript of proceedings before the Board exceeded 20,000 pages, exhibits numbered several hundreds, and scores of issues were presented for decision. In consequence, numerous conferences between Company officials and Board personnel have been necessary in order to resolve problems of interpretation and application of the Board's order. Even so, many issues remain unsettled.

2112 (a) and of the review provisions of the NLRA. In effect, the Court of Appeals has held, on this hypothesis, that the employment of District of Columbia counsel to conduct proceedings to review NLRB orders outweighs, for purposes of forum selection, all other considerations affecting the convenience of the parties and the interest of justice.

We suggest that such an artificial and mechanical test cannot have been in the contemplation of Congress when it enacted 28 U.S.C. § 2112 (a) and that the adoption of such a test by the District of Columbia Circuit justifies review and correction by this Court.

The alternative, and more probable, ground of decision of the Court of Appeals is that Section 10 (f) of the NLRA creates a right of review in the District of Columbia Circuit which is unaffected by the *forum non conveniens* considerations written into 28 U.S.C. § 2112 (a). The basis for the argument in favor of this construction is found in the first sentence of Section 10 (f) which provides in pertinent part:

> Any party aggrieved by a final order of the Board . . . may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia . . . .

The argument made to the District of Columbia Circuit is, in effect, that the specific reference to the "United States Court of Appeals for the District of Columbia" reflects Congressional recognition of the special competence and experience of that Court in

the review of administrative action. Because of that special competence and experience, so the argument runs, Congress has provided that persons aggrieved by Board orders shall have a right to review in the District of Columbia Circuit alternative to their right to proceed in one of the other circuits specified in 10 (f). The Congressional purpose in granting this so-called District of Columbia option would be defeated, it is said, if the jurisdiction of the District of Columbia Court were held to be subject to the *forum non conveniens* provisions of 28 U.S.C. § 2112 (a).[5]

There are two fundamental objections to the argument. First, since the Board deems itself bound by 28 U.S.C. § 2112 (a) to file its record and its 10 (e) petition for enforcement with the 2112 (a) court, the interpretation given to 10 (f) by the District of Columbia Circuit has the practical effect of compelling the Board to bring enforcement proceedings in the District of Columbia Court without regard to the place of residence of the person against whom the Board order runs. Thus, for the exercise of the Board's discretion as to the need, place, and time for the initiation of enforcement proceedings there is substituted the judgment of the Charging Party. That result cannot be reconciled with the decisions of this Court

[5] The argument that the D. C. Circuit has peculiar expertise in NLRA cases is completely lacking in statistical support. Table B3 of the 1960 Annual Report of the Director of the Administrative Office of the United States Courts shows that for the 5-year period 1956-1960 the District of Columbia Circuit ranked seventh among the eleven Courts of Appeals in number of NLRB proceedings reviewed. In none of the 5 years did the D. C. Circuit rank higher than sixth in cases of this type. Percentagewise the District of Columbia Circuit disposed of 6% of the cases arising from NLRB proceedings during the 5-year period.

in *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 265 and *Nathanson* v. *NLRB*, 344 U. S. 25, where it was held that the Board has complete and exclusive control over proceedings to enforce its orders. Moreover, the result reached by the Court of Appeals is inconsistent with the long line of decisions in this Court recognizing the broad remedial discretion of the Board.[6]

The second objection to a construction of Section 10 (f) and 28 U.S.C. § 2112 (a) which would recognize an optional right of review in the District of Columbia independent of *forum non conveniens* considerations is that it flies in the face of the legislative history of both Section 10 (f) and 28 U.S.C. § 2112 (a). Every reference to the District of Columbia Court that we have discovered in the legislative history of Section 10 (f) reflects solely a Congressional intent to provide a *convenient*, rather than a peculiarly expert, optional forum for aggrieved litigants.

We find no special reference to the District of Columbia Circuit in the legislative history of 28 U.S.C. § 2112 (a). On the contrary, discussion of the purpose of the Bill is cast, throughout that history, in terms of the courts of appeals generally. We submit that there is no warrant for carving from the operation of the provision an exception for the District of Columbia Circuit in the complete absence of any expression of Congressional intent to create such an exception.

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[6] See, for example, NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346 (1953); NLRB v. Gullett Gin Co., 340 U.S. 361, 363 (1951); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 194 (1941).

(c) The Conflict Within the Circuit

The following table shows the names of the three cases which have presented to the Court of Appeals the question raised by the Kohler Motion to Transfer, the disposition made in each case of the Motion to Transfer and the panel of the Court of Appeals to which the Motion was presented:

Case Name and Number	Disposition of Motion to Transfer	Panel
Gulf Bottlers Co., Cases Nos. 15,754 and 15,929	Denied (App. C, p. 18a)	Chief Judge Prettyman Circuit Judge Edgerton
Butcher Boy Refrigerator Door Co., Cases Nos. 15,849 and 15,885	Granted (App. D, p. 20a)	Circuit Judges Wilbur K. Miller, Fahy, Danaher
Kohler Co., Cases Nos. 15,961 and 16,031	Denied (App. A, p. 1a)	Circuit Judges Prettyman, Fahy, Burger

Since no opinion was rendered in any of the cases, it is impossible to know whether *Butcher Boy* has been overruled, or whether a conflict exists within the Circuit.

The inconsistency in the results reached was pointed out to the Court in motions for reconsideration *en banc* filed by both Gulf Bottlers and Kohler Co. Reconsideration was, nevertheless, denied in both cases.

Under the circumstances it is submitted that the case may be an appropriate one for the employment of the procedure followed in *United States ex rel. Robinson* v. *Johnston*, 316 U. S. 648. There, certiorari was granted, partially because of an intra-circuit

conflict, and the case was remanded to the Court of Appeals for further consideration with express leave to the petitioner to apply to the Court of Appeals for a hearing *en banc*.

CONCLUSION

The order of the Court of Appeals denying the Motion of Kohler Co. to transfer to the Seventh Circuit has disposed finally of an issue which is "fundamental to the further conduct of the case." *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U. S. 682, 685. See also, *Hoffman* v. *Blaski*, 363 U. S. 335; *Land* v. *Dollar*, 330 U. S. 731; *United States* v. *General Motors Corp.*, 323 U. S. 373. Moreover, as Judge Frank noted with the concurrence of Judge Learned Hand, in *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329 (2d Cir. 1950), *cert. denied* 340 U. S. 851, denial of a transfer is the sort of interlocutory order which justifies an extraordinary appellate remedy, for

> ". . . should petitioners—the defendants—finally lose on the merits below, any error in the interlocutory order would probably be incorrectible on appeal, for petitioner could hardly show that a different result would have been reached had the suit been transferred . . . ." (182 F. 2d at p. 330)

For the reasons stated, it is respectfully submitted that a writ of certiorari should be granted.

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APPENDIX A

Filed Nov. 23, 1960

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1960

No. 15,961

LOCAL 833, UAW-AFL-CIO, INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

No. 16,031

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

KOHLER COMPANY, *Respondent.*

Before: Prettyman, Fahy and Burger, Circuit Judges, in Chambers.

Order

Upon consideration of the motion of Kohler Company to transfer the proceedings of these cases to the United States Court of Appeals for the Seventh Circuit, of the opposition, of the reply to the opposition and of the statement filed by the National Labor Relations Board, it is

ORDERED by the court that the motion to transfer is denied.

Per Curiam.

Dated: November 23, 1960

Filed Jan. 9, 1961

Before: Wilbur K. Miller, Chief Judge, Edgerton, Prettyman, Bazelon, Fahy, Washington, Danaher, Bastian and Burger, Circuit Judges, in Chambers.

Order

Upon consideration of the motion of the Kohler Company for rehearing en banc on its motion to transfer these proceedings to the United States Court of Appeals for the Seventh Circuit and of the request for oral argument and of the opposition thereto, it is

ORDERED by the court that the motion for rehearing en banc and request for oral argument are denied.

Per Curiam.

Dated: January 9, 1961

Filed Aug. 26, 1960—10:35 a.m.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,961

LOCAL 833, UAW-AFL-CIO, INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

Petition for Review of an Order of the National Labor Relations Board

Pursuant to Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 141, *et seq.*), petitioner named in the caption, petitions this Court to review and modify or partially set aside the Decision and Order of the National Labor Relations Board entered on August 26, 1960 in a proceeding identified upon the rec-

ords of the Board as Case No. 13-CA-1780, in which the charging party is petitioner herein.

1. Upon due proceedings had before the Board in said matter, a trial examiner issued his Intermediate Report on the 9th day of October, 1957, in which he made findings of fact and conclusions of law finding that the Kohler Co., the party charged, had engaged in unfair labor practices, and issued recommendations based thereon. After certain further proceedings the trial examiner, on March 5, 1959, issued a Supplemental Intermediate Report renewing the recommendations made in the Intermediate Report. Thereafter, upon exceptions filed by both parties with the National Labor Relations Board, on August 26, 1960, the Board issued its Decision and Order in the aforesaid proceedings, sustaining certain of the Kohler Co.'s exceptions and overruling certain of petitioner's exceptions. Petitioner seeks review and modification of the Board's Decision and Order.

2. Venue is based upon that part of Section 10(f) of the National Labor Relations Act, as amended, which provides that:

> "Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside."

Petitioner, the charging party in the proceedings before the National Labor Relations Board, is a person aggrieved by the Board's Order.

3. *The action of the Board is not supported by substantial evidence on the record or by applicable law and is arbitrary and capricious and an abuse of discretion.*

WHEREFORE, Petitioner prays that the Court modify or partially set aside the Board's Decision and Order and grant such other and further relief as may be just and proper.

Respectfully submitted,

JOSEPH L. RAUH, JR.
Joseph L. Rauh, Jr.

JOHN SILARD
John Silard
1631 K Street, N. W.
Washington 6, D. C.

Filed Oct. 13, 1960

No. 15,961

Answer of the National Labor Relations Board to Petition to Review an Order of the Board

The National Labor Relations Board files the following answer to the Petition to Review filed in this proceeding:

1. The Board admits the allegations of paragraphs 1 and 2.

2. The Board denies the allegations of paragraph 3.

3. The Board will file with the Court a certified list of all the documents, transcripts of testimony, exhibits and other material comprising the record in the proceeding, as provided in Rule 38(g) of this Court.

WHEREFORE, the Board prays that this Court cause notice of the filing of this Answer to be served on the petitioner

and that this Court enter a decree denying the Petition to Review.

MARCEL MAILLET-PREVOST
Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board

Dated at Washington, D. C.,
this 12th day of October, 1960.

Filed Oct. 13, 1960

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,031

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

KOHLER CO., *Respondent*.

Petition for Enforcement of an Order of the National Labor Relations Board

To the Honorable, the Judges of the United States Court of Appeals for the District of Columbia Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151 *et seq.*, as amended by 73 Stat. 519), respectfully petitions this Court for the enforcement of its order against Respondent, Kohler Co., Kohler, Wisconsin, its officers, agents, successors and assigns. The proceeding resulting in said order is known upon the records of the Board as Case No. 13-CA-1780.

In support of this petition the Board respectfully shows:

1. Upon proceedings had before the Board in said matter, the Board on August 26, 1960, duly stated its findings of

fact and conclusions of law, and issued an order directed to the Respondent herein, its officers, agents, successors and assigns. The Board Decision and Order was served by personal service on respondent's counsel on the same date.

2. On August 26, 1960 pursuant to Section 10(f) of the Act, *Local 833, UAW-AFL-CIO, International Union, United Automobile, Aircraft, & Agricultural Implement Workers of America*, the charging party in the Board proceeding, filed with this Court a petition to review the Board's Decision and Order. Said petition appears on the docket of the Court as No. 15,961, *Local 833, UAW-AFL-CIO, International Union, United Automobile, Aircraft, & Agricultural Implement Workers of America*. The Board has filed an Answer to said petition.

3. Also on August 26, 1960, but 35 minutes after the petition in No. 15,961 was filed in this Court, pursuant to Section 10(f) of the Act, Respondent filed with the Court of Appeals for the Seventh Circuit a petition to review the Board's Decision and Order. Said petition appears on the docket of that court as No. 13,120, *Kohler Co.* v. *N.L.R.B.* The Board filed an answer to said petition advising the court that a previous petition to review had been filed with this Court, that the Board was required by statute to file the certified record in this case with this Court, and that the Board reserved further answer.

4. Concurrently herewith, in accordance with the Union's petition for review and pursuant to Rule 38(g) of this Court and 28 U.S.C. Sec. 2112(a) (72 Stat. 941) the Board is filing a certified list of all documents, transcripts of testimony, exhibits and other material comprising the entire record of the proceedings before the Board upon which the said order was entered, which includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and order of the Board. Said list is filed with this Court as the court in which the first petition for review was filed.

The same certified list also constitutes the certified record in the instant proceeding.

5. Although Respondent is a Wisconsin corporation engaged in business in the State of Wisconsin, this Court has jurisdiction of this petition for enforcement by virtue of its jurisdiction over the entire proceeding upon the filing of the certified list in connection with the petition to review in No. 15,961. *International Ladies Garment Workers' Union v. N.L.R.B.*, 96 App. D.C. 272, 225 F. 2d 923.

WHEREFORE, the Board prays this Honorable Court that it cause notice of the filing of this petition to be served upon Respondent, and that this Court take jurisdiction of the proceedings and of all questions determined therein, and make and enter upon the pleadings, the testimony and evidence, and the proceeding set forth in the transcript, and upon the order made thereupon, a decree enforcing the Board's order and requiring Respondent, its officers, agents, successors and assigns, to comply therewith.

MARCEL MALLET-PREVOST
Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board

Dated at Washington, D. C.,
this 12th day of October, 1960.

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL

Washington 25, D. C.

October 12, 1960

Joseph W. Stewart, Esquire
Clerk, United States Court of Appeals
for the District of Columbia Circuit
3rd & Constitution Avenue, N. W.
Washington 25, D. C.

Re: No. 15,961—*Local 833, UAW-AFL-CIO, Int'l Union, United Automobile, Aircraft, & Agricultural Implement Workers of America* v. *N.L.R.B.*
N.L.R.B. v. *Kohler Co.*

Dear Mr. Stewart:

I am enclosing eight mimeographed copies each of the Board's answer to petition to review in Case No. 15,961, and of the petition for enforcement in *N.L.R.B.* v. *Kohler Co.*, and six mimeographed copies of the certified list of the National Labor Relations Board in these cases and of the index to that list.

Both the captioned cases arise out of a single order of the Board issued on August 26, 1960. On the same date two petitions were instituted to review the Board's order: (1) by the charging Union in this Court, and (2) by the Company in the Court of Appeals for the Seventh Circuit. The Company's petition for review was filed at 10:00 a.m. Central Daylight Saving Time and the Union's petition was filed at 10:35 a.m. Eastern Daylight Saving Time. While it is not free from doubt, the Board has determined that the petition filed in this Court was the one which was first filed within the meaning of Section 2112(a) of 28 U.S.C. Accordingly, we are filing the certified list in this Court, and we have filed a motion in the Seventh Circuit asking.

that court, pursuant to Section 2112(a), to transfer the proceedings before it to this Court.

Copies of this letter and attached documents are also being sent to the Regional Office in which the case arose. Although this matter is now being handled directly through the Washington Office, we shall appreciate your keeping the Regional Director, whose name and address is listed on the attached sheet, advised of the progress of this case by furnishing him with copies of all correspondence addressed to me or opposing counsel.

In accordance with Section 10(e) of the National Labor Relations Act, as amended, will you kindly notify the persons listed on the attached sheet of the filing of the certified list with index, answer, and petition. Certificate of service is also enclosed.

Very truly yours,

STUART ROTHMAN
General Counsel

By MARCEL MALLET-PREVOST
Marcel Mallet-Prevost
Assistant General Counsel

Excerpts from General Docket

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15961

LOCAL 833, UAW v. N.L.R.B.

Date	Filings—Proceedings	Filed
8-26-60	Petition for review of order of the National Labor Relations Board	

10-13-60 Respondent's answer to petition for review "

10-21-60 Motion of respondent in No. 16,031 to transfer to Seventh Circuit "

11- 4-60 Opposition of petitioner to motion of Kohler Co. to transfer proceedings "

11-18-60 Reply of Kohler Company to objection to motion to transfer proceedings "

11-23-60 Per Curiam order consolidating this case and No. 16,031; and allowing Kohler Company to intervene in this case "

11-23-60 Per Curiam order denying motion of Kohler Company to transfer the proceedings to the U. S. Court of Appeals for the 7th Circuit "

11-23-60 Memorandum of N.L.R.B. "

12- 7-60 Intervenor's motion to reconsider motion to transfer proceedings to 7th Circuit "

12-13-60 Petitioner's objection to motion to reconsider motion to transfer proceedings "

1- 9-61 Per Curiam order denying motion for rehearing en banc and request for oral argument "

Filed August 26, 1960

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 13,120

KOHLER CO., a Wisconsin Corporation, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

Petition for Review of Order of the National Labor Relations Board

To the Honorable, the Judges of the United States Court of Appeals for the Seventh Circuit:

Kohler Co., a Wisconsin corporation respectfully represents:

1. Petitioner is, and at all times mentioned herein was, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and having its principal office, manufacturing plant, and place of business in the Village of Kohler, in said State of Wisconsin.

2. The proceedings as to which review is sought resulted in a Decision and Order made by the National Labor Relations Board on February 6, 1957 (117 NLRB 321) in a proceeding entitled Kohler Co. and Local 833, UAW-CIO, International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Case No. 13-CA-1780, by which said Decision and Order the National Labor Relations Board overruled an Opinion and Order of the Trial Examiner dated October 15, 1956, denied petitioner's motion to dismiss the complaint for lack of jurisdiction because the charging party was not in compliance with Section 9(h) of the National Labor Relations Act, as amended, and remanded the case to the Trial Examiner for the preparation of an Intermediate Report.

Said proceedings culminated in a Decision and Order made by the National Labor Relations Board on ..... 1959, in which the Board held that petitioner had violated Sections 8 (a) (1), 8 (a) (3) and 8 (a) (5) of the National Labor Relations Act, as amended, and ordered petitioner to cease and desist from sundry alleged practices, to make whole certain employees and to take certain affirmative actions as set forth in an appendix to said Decision and Order.

3. This Court has jurisdiction under Section 10 (f) of the National Labor Relations Act, as amended, the alleged unfair labor practices having been alleged to have been engaged in at Kohler, Wisconsin, and petitioner having its principal office, manufacturing plant and place of business and transacting business in Kohler, Wisconsin, within the Seventh Judicial Circuit.

4. Petitioner states that it is aggrieved by said Decisions and Orders and that said Decisions and Orders are unreasonable, capricious, arbitrary and contrary to law for the following reasons:

A. The Board was lacking in jurisdiction to issue any complaint, entertain any proceeding or to enter any Decision or Order or to afford any relief to the Charging Party for the reason that said Charging Party had not complied with the provisions of Section 9 (h) of the National Labor Relations Act, as amended.

B. The Board's Decision and Order is not supported by substantial evidence on the record considered as a whole.

C. The Board's Decision and Order will not effectuate the purposes of the Act.

D. The Board's Decision and Order is in contravention of the National Labor Relations Act, as amended, and the due process clause of the Constitution of the United States.

E. The Board erred in failing to find that petitioner had not engaged in any unfair labor practice under the National Labor Relations Act, as amended.

F. The Board erred in failing to find that, from May 4, 1954, and continuously thereafter, the Charging Party was not bargaining in good faith in that it was insisting, as a condition of settlement, on agreement on a subject outside of the scope of mandatory bargaining, i.e. agreement that all strikers should be reinstated regardless of unlawful conduct or misconduct.

G. The Board erred in failing to sustain each of petitioner's exceptions to the Trial Examiner's Intermediate Report and to the Supplemental Intermediate Report filed in the said proceeding.

H. The Board erred in failing to find that the Trial Examiner committed prejudicial error in his ruling at the original hearing and on the hearing on reopening in rejecting testimony and exhibits offered by petitioner and in unduly restricting petitioner's right of examination of adverse parties.

I. The Board erred in that its "Order Remanding Proceeding to Regional Director For Further Hearing", dated November 19, 1958, was unduly restrictive and therefore prejudicial to petitioner.

J. The Board erred in failing to find that the union had lost its majority status prior to February 10, 1955, and that such loss of majority status was not due to any unfair labor practice on the part of petitioner.

K. The Board erred in sustaining the Trial Examiner's rejection of petitioner's motion to dismiss the proceeding for abuse of process.

WHEREFORE, petitioner prays that said Decisions and Orders of the National Labor Relations Board be annulled and set aside, that the National Labor Relations Board be directed to dismiss its complaint against the petitioner, and

that petitioner have such other and further relief as may be just and proper.

Respectfully submitted,

LYMAN C. CONGER
EDWARD J. HAMMER
Attorneys for Petitioner

Kohler, Wisconsin

LYMAN C. CONGER
EDWARD J. HAMMER
c/o Kohler Co.,
Kohler, Wisconsin

Of Counsel:

WILLIAM F. HOWE,
Gall, Lane and Howe,
401 Commonwealth Building,
Washington 6, D. C.

ELLISON D. SMITH, JR.,
703 Barringer Building,
Columbia, S. C.

Filed October 13, 1960

Answer of the National Labor Relations Board to Petition for Review of an Order of the Board

The National Labor Relations Board files the following answer to the Petition for Review filed in this proceeding.

1. The Board admits the allegations in Paragraphs 1, 2, and 3, but shows the Court that at the time the petition for review was filed in this Court, a petition for review of the same Decision and Order was on file in the Court of Appeals for the District of Columbia Circuit, being case No. 15,961.

2. (a) The Board shows that under 28 U.S.C. Sec. 2112 (a) (72 Stat. 941), it is required to file the record in this case with the court in which the proceeding with respect to its order was first instituted, in this instance the Court of Appeals for the District of Columbia Circuit, and that such record is to be filed on or before October 15, 1960.

(b) Further answering the Board shows that under the same statute the present proceeding before this Court is to be transferred to the Court of Appeals for the District of Columbia Circuit upon such filing of the record.

3. The Board respectfully reserves further response to the petition until the venue of the proceeding is settled.

WHEREFORE, the Board prays that this Court cause notice of the filing of this Answer to be served on petitioner.

MARCEL MALLET-PREVOST
Marcel Mallet-Prevost
Assistant General Counsel
National Labor Relations Board

Dated at Washington, D. C.,
this 12th day of October, 1960.

Order

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

January 18, 1961

Before

Hon. JOHN S. HASTINGS, *Chief Judge*
Hon. F. RYAN DUFFY, *Circuit Judge*
Hon. WM. G. KNOCH, *Circuit Judge*

No. 13120

KOHLER CO. a Wisconsin Corporation, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

Under date of August 26, 1960, at the hour of 10:10 A.M. Central Daylight Time, Kohler Co. filed its Petition for Review of an Order of the National Labor Relations Board. The Board on October 14, 1960, filed its answer to that Petition stating that at the time that the aforesaid Petition was filed in this Court, a Petition for Review of the same decision and order was on file in the Court of Appeals for the District of Columbia Circuit, which case was No. 15961, and that, under authority of Title 28, U.S.C., § 2112(a) (72 Stat. 941) the Board was required to file the record in this cause with the Court in which the proceedings with respect to its order were first instituted, in this instance, the Court of Appeals for the District of Columbia Circuit; and that under the same Statute, the present proceeding before this Court was to be transferred to the Court of Appeals for the District of Columbia Circuit upon such filing of the record. The Board therefore moved that this Court transfer the proceedings in this case to the Court of Appeals for the District of Columbia Circuit as required by the Statute. On October 21, 1960, Kohler Co. filed its

Opposition to the Motion of the National Labor Relations Board to Transfer Cause, in which it was indicated that Kohler Co. had filed a motion with the Court of Appeals for the District of Columbia Circuit to transfer the proceedings from that Court to this Court "[f]or the convenience of the parties in the interest of justice" in accordance with the provisions of the aforesaid Statute; to which the Board filed a reply inviting this Court's attention to the wording of the Statute which states:

> "The other courts in which such proceedings are pending *shall* thereupon transfer them to the court of appeals in which the record has been filed. For the convenience of the parties in the interest of justice such court *may* thereafter transfer all the proceedings with respect to such order to any other court of appeals." [emphasis added]

On November 23, 1960, the Court of Appeals for the District of Columbia Circuit denied Kohler Co.'s motion to transfer all of the proceedings there pending to this Court. Under date of November 30, 1960, Kohler Co. filed a statement indicating that motion for reconsideration would be presented. On December 7, 1960, Kohler Co. filed a Petition for Rehearing En Banc with the Court of Appeals for the District of Columbia Circuit. On January 9, 1961, this petition was denied.

Accordingly, pursuant to Title 28, U.S.C., § 2112(a), this Court is herewith transferring this cause to the Court of Appeals for the District of Columbia Circuit.

A True Copy:

Teste:

KENNETH J. CARRICK
Clerk of the United States Court of Appeals for the Seventh Circuit.

Filed Oct. 3, 1960

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,759

INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL, SOFT DRINK and DISTILLERY WORKERS OF AMERICA, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

No. 15,929

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

GULF BOTTLERS, INC., *Respondent*.

Before: PRETTYMAN, *Chief Judge*, and EDGERTON, *Circuit Judge*, in Chambers.

Order

Upon consideration of the motion of Gulf Bottlers, Inc., to transfer these cases to the United States Court of Appeals for the Fifth Circuit, of the opposition and of the reply, it is

ORDERED by the court that in so far as Gulf Bottlers, Inc., moves to transfer these cases the motion is denied and that in so far as Gulf Bottlers, Inc., moves to dismiss, said motion is denied without prejudice to a renewal at the hearing of these cases on the merits.

PER CURIAM.

Dated: October 3, 1960

Excerpts from General Docket

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15929

N.L.R.B. v. Gulf Bottlers, Inc.

Date	Filings—Proceedings	Filed
8-26-60	Respondent's motion to dismiss, or in the alternative to transfer to Court of Appeals for the Fifth Circuit	"
9-14-60	Opposition of petitioner in case No. 15,759 to motions of Gulf Bottlers, Inc.	"
9-23-60	Petitioner's answer to Gulf Bottlers' opposition to motion to dismiss	"
10- 3-60	Per Curiam order denying motion of Gulf Bottlers, Inc. to transfer this case and No. 15,759 to the U. S. Court of Appeals for the 5th Circuit; and denying motion of Gulf Bottlers, Inc. to dismiss without prejudice to a renewal at the hearing on the merits	"
10- 6-60	Petition of Gulf Bottlers, Inc., for rehearing and for rehearing en banc	"
12- 8-60	Per Curiam order denying petition of Gulf Bottlers, Inc., for rehearing en banc	Filed
12- 8-60	Per Curiam order denying petition of Gulf Bottlers, Inc., for rehearing by the original division of the court	

Filed Sep 16 1960

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,849 September Term, 1960

LOCAL 2674, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*.

No. 15,885

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

BUTCHER BOY REFRIGERATOR DOOR COMPANY, *Respondent*.

Before: WILBUR K. MILLER, FAHY and DANAHER, *Circuit Judges*, in Chambers.

Order

Upon consideration of the motion of Butcher Boy Refrigerator Door Company for leave to intervene in case No. 15,849, of the motion of Butcher Boy Refrigerator Door Company to transfer these cases to the United States Court of Appeals for the Seventh Circuit, of the opposition to the motion to transfer, of the answer to the motion to transfer filed by the Board, and of the motion of the Board for leave to file a single certified list of the record in these cases, it is

ORDERED by the court that Butcher Boy Refrigerator Door Company is allowed to intervene in case No. 15,849, that the motion to transfer these cases to the United States Court of Appeals for the Seventh Circuit is granted and that the Clerk is directed to transmit to the United States

Court of Appeals for the Seventh Circuit the original copies of all documents filed in these cases.

It is FURTHER ORDERED by the court that the motion of the National Labor Relations Board for leave to file a single certified list of the record in these cases is dismissed as moot.

PER CURIAM.

Dated: September 16, 1960

Excerpts from General Docket

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,885

NATIONAL LABOR RELATIONS BOARD

v.

BUTCHER BOY REFRIGERATOR DOOR COMPANY

Date	Filings & Proceedings
7-27-60	Motion of Butcher Boy Refrigerator Door Co. to transfer proceedings.
. . . . .	
8- 4-60	Opposition of Petitioner in No. 15,849 to Motion of Intervenor Butcher Boy Refrigerator Door Co., to transfer proceedings.
. . . . .	

FILE COPY

No. 707

FILED
MAR 8 1961
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

KOHLER CO.,

Petitioner,

v.

LOCAL 833, UAW-AFL-CIO, INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

and

NATIONAL LABOR RELATIONS BOARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR LOCAL 833, UAW-AFL-CIO

JOSEPH L. RAUH, JR.,
JOHN SILARD,
1631 K Street, N. W.,
Washington 6, D. C.,
Attorneys for Respondent
Local 833, UAW-AFL-CIO

Of Counsel:

HAROLD A. CRANEFIELD,
General Counsel, UAW-AFL-CIO,
8000 East Jefferson Avenue,
Detroit 14, Michigan.

LOUIS H. POLLAK,
127 Wall Street,
New Haven, Connecticut.

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Greve v. *Gibraltar Enterprises*, 85 F. Supp. 410 (D.C.N.M., 1949)	10
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 707

KOHLER CO.,

Petitioner,

v.

LOCAL 833, UAW-AFL-CIO, INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

and

NATIONAL LABOR RELATIONS BOARD,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR LOCAL 833, UAW-AFL-CIO

Counter-Statement of the Case

In perusing the Kohler Company's petition for certiorari the Court may well wonder why the Company is going to such unprecedented lengths to transfer these review and enforcement proceedings out of the District of Columbia Circuit into the Seventh Circuit when nothing in the Company's petition discloses any real benefit or convenience

to the Company from such a transfer. The undisclosed reason for the Company's repeated efforts to transfer to the Seventh Circuit (first before the Labor Board, then twice before the District of Columbia Circuit and now finally by an attempt to obtain interlocutory review here) is the Company's determination to gain the *stare decisis* benefit of *Goodman Mfg. Company* v. *NLRB*, 234 F. 2d 775 (C.A. 7, 1956). In *Goodman* the Seventh Circuit held that Labor Board proceedings can not be instituted on behalf of a union unless its trustees filed non-Communist affidavits under Section 9(h) of the Taft-Hartley Act.[1] Since the UAW trustees had not filed 9(h) affidavits, the *Goodman* ruling was squarely before (and expressly rejected by) the Labor Board in the instant case.[2] The sequence of events below will reveal most clearly that it is only to obtain the benefit of the *Goodman* ruling that the Company seeks a reversal here of the District of Columbia Circuit's unanimous refusal to transfer proceedings to the Seventh Circuit:

1. After decades of Kohler Company anti-union activity and a history of company unions, in 1952 the United Automobile Workers was chosen as bargaining agent by the employees of Kohler and entered into contractual relations with the Company. In April 1954, after futile efforts to reach agreement on a new contract, there was commenced at Kohler what became the longest major strike in the history of the nation. On October 26, 1954, the Board's General Counsel issued a complaint against the Kohler

[1] The Seventh Circuit so held in *Goodman* even though the union trustees were not denominated "officers" in the union's constitution. Cf. *N.L.R.B.* v. *Coca-Cola Bottling Co.*, 350 U.S. 264 and *Ekco Products Co.*, 117 N.L.R.B. 137, wherein this Court and the Labor Board expressly adopted the constitutional test of officership which the Seventh Circuit rejected in *Goodman*.

[2] 117 N.L.R.B. 321; 128 N.L.R.B. No. 122.

Company which, as subsequently amended, charged the Company with long continued refusal to bargain in good faith with the Union, a refusal causing and prolonging the strike. After lengthy proceedings, the Board ruled in substance:

(a) *against the Company:*

(i) that the Company has refused to bargain with the Union in good faith from and after the third month of the strike, and

(ii) that the Company must, therefore, bargain in good faith and, upon application, reinstate some 1600 Kohler strikers.

(b) *against the Union:*

(i) that the strike did not result from the Company's refusals to bargain, although it was long protracted thereby, and

(ii) that some 77 strikers (comprising the entire leadership of the local union, including all of its officers, Executive Board, and Strike Committee) were validly discharged and are not entitled to reinstatement.

2. In the Board proceedings, the Company challenged the jurisdiction of the Board on the ground that the Union's trustees had failed to file non-Communist affidavits under Section 9(h) of the Taft-Hartley Act (a section recently repealed by the Congress). In urging that UAW trustees are "officers" of the Union required to file 9(h) affidavits, the Company relied upon the Seventh Circuit's 1956 *Goodman* decision, the only case which adjudicates the trustee question. The Trial Examiner accepted the Company's view and dismissed the proceedings, relying on *Goodman*. On appeal, a unanimous

Labor Board reversed the Trial Examiner and reinstated the proceedings, rejecting the Seventh Circuit's *Goodman* ruling that trustees are "officers" of a union though not so denominated in the union's constitution. 117 N.L.R.B. 321. The Board in its final Decision and Order has unanimously reaffirmed its ruling rejecting *Goodman*.

3. On August 24, 1960, it was announced that the Board would release its decision in its Executive Secretary's office in Washington at 10:30 a.m. on August 26th. The Union anticipated (correctly, as events proved) that if the Trial Examiner's findings against the Company were affirmed in any substantial respect, the Company would thereupon rush into the Seventh Circuit with a petition for review so as to gain the benefit of the *Goodman* ruling. On the morning of the release of the Board's decision the Union had ready for filing at the office of the Clerk of the Court of Appeals for the District of Columbia Circuit alternative petitions for review, responsive to the varying possible Board decisions. After receiving and viewing the Board's Decision and Order at 10:30 a.m., the Union immediately (10:35 a.m.) filed the appropriate petition for review with the Court of Appeals for the District of Columbia Circuit. The Company, which had likewise prepared alternative petitions in advance, filed its Seventh Circuit petition in Chicago thirty-five minutes later, some forty minutes after the release of the Board's decision in Washington.[3] The Company's first tendered ground for reversal in that Seventh Circuit petition was that "the Board was lacking

[3] In its petition for certiorari, the Company refers invidiously to the fact that the Union "outsped" the employer "in a race to the courthouse" (p. 9). But the Company, like the Union, was engaged in a race of diligence—the Company to obtain review by the *Goodman* circuit, the Union to obtain review in an uncommitted circuit. Having entered the race, the Company ought not be heard to deprecate the significance of its outcome or to complain that it was bested in diligence by the Union.

in jurisdiction . . . for the reason that said Charging Party had not complied with the provisions of Section 9(h) of the National Labor Relations Act . . ."

4. Thereafter, in its continuing effort to gain the benefit of *stare decisis* in the *Goodman* circuit, the Company filed applications before the Labor Board against the filing of the record in the Court of Appeals for the District of Columbia Circuit. The Board, however, adhering to the clear statutory standard of "first instituted" under 28 U.S.C. 2112(a), filed the record in that Circuit and instituted appropriate enforcement proceedings in that Court.

5. Thereafter, the Company intervened in the Court of Appeals below and moved for transfer to the Seventh Circuit under 28 U.S.C. 2112(a) on *forum non conveniens* grounds. The motion was opposed by the union, Local 833, UAW-AFL-CIO; the National Labor Relations Board took no position on the motion.[4] The Court of Appeals unanimously denied the Company's motion by an order of November 23, 1960 (per Judges Prettyman, Fahy and Burger). The Company's application for rehearing en banc was likewise unanimously rejected by an order of the full Court of Appeals on January 9, 1961. Subsequently, pursuant to 28 U.S.C. 2112(a), the Company's review petition filed in the Seventh Circuit has, on motion of the National Labor Relations Board, been transferred to the District of Columbia Circuit.

[4] The Board did, however, advise the Clerk of the Circuit Court by letter of October 12, 1960, regarding the *Kohler* case that "this matter is now being handled directly through the Washington office" and the Company in its petition here (at p. 11) concedes that "the Associate General Counsel of the Board who has general supervision over proceedings to enforce NLRB orders" resides and practices in the District of Columbia.

Argument

In this case interlocutory review is sought by certiorari under 28 U.S.C. 1254(1) over the refusal by the court below to effect a *forum non conveniens* transfer to the Seventh Circuit. But in its petition before judgment below the Company nowhere purports to meet nor does it even cite Rule 20 of this Court, which requires "a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court." Far from making a showing of "imperative public importance," no grounds whatever are presented to warrant the interlocutory grant of certiorari sought by the Company; indeed, the court below could have reached no other result than to have denied the Company's request for transfer.

(a) *The Court Below Has Properly Resolved the* Forum Non Conveniens *Question in Accordance with Applicable Law*

The statute under which the Company seeks a transfer, 28 U.S.C. 2112(a), codifies familiar *forum non conveniens* law—transfer must be predicated upon "the convenience of the parties in the interest of justice." The same terms under 28 U.S.C. § 1404(a), providing for district court transfers, have received considerable judicial gloss. Among the familiar principles in their construction, derived from the original equity doctrine, is the rule that it is the burden of the party moving for transfer to make a persuasive showing of convenience before a court will disturb the plaintiff's choice of forum.

As stated in this Court's decision in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508:

> "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."

The generally accepted construction of the *Gulf Oil* test is that by Judge Frank in *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329, 330 (C.A. 2, 1950):

> "Those words we interpret to mean (a) that a defendant has the burden of making out a strong case for transfer and (b) that the plaintiff's privilege, conferred by statute, of choosing the forum he selected is a factor to be considered as against the 'convenience' of the witnesses or what otherwise might be the balance of 'convenience' as between 'the parties.'"

The Company failed to meet its "burden of making out a strong case" for transfer. Indeed, neither below nor here has the Company suggested any "inconvenience" factor which would warrant such a transfer. On the contrary, the Company concedes (p. 11) that as concerns the District of Columbia "*principal appellate counsel for the Union reside and practice here, as do associated counsel for the Company and the Associate General Counsel of the Board who has general supervision over proceedings to enforce NLRB orders.*" With counsel for all three parties located in the District of Columbia and *no* counsel for any of the parties residing in Chicago where the Seventh Circuit review would take place, it is clear that the convenience of all those involved in these appellate proceedings—the counsel for the parties—is *entirely* in favor of retention of review in the District of Columbia.[5]

[5] The Company suggests that its *principal* counsel resides in the Seventh Circuit (actually at Kohler, Wisconsin). But with principal counsel for the other two parties admittedly residing in the District of Columbia as well as associated counsel for the Company, the mere fact that the

In an attempt to avoid the "convenience of the parties" standard of the statute here involved, the Company suggests that certain "contacts with the case lie in the Seventh Circuit" (p. 11). Specifically, the Company asserts that the Union and the Company "reside" in that Circuit, as do the employees of the company involved in these unfair labor proceedings, and that the unfair labor practices occurred in that jurisdiction. But the "residence" of the parties, or of Kohler workers, has no bearing whatever upon the appellate proceedings here involved; indeed, the Company does not even attempt to show that these "contacts" affect the convenience of the parties in any way in these appellate proceedings.

The Company also asserts that in this case compliance with the Board's order must "be supervised" in the Seventh Circuit (p. 11). Unless the Company is suggesting that it may not comply with a judicial enforcement order, which it expressly denies (p. 11, n. 4), judicial supervision will hardly be necessary and, if defiance there should be, there would be no element of convenience in having such judicial supervision in Chicago, where no counsel resides, as against the District of Columbia where counsel are located. At any rate, Congress has provided that the District of Columbia is an appropriate alternative forum at the option of an aggrieved party to challenge Labor Board orders, *irrespective* of the non-residence of the parties and the situs elsewhere of "compliance" with the order involved;[8] accordingly, non-residence and "com-

Company's "principal" counsel resides in Wisconsin could not possibly require the transfer of these proceedings to Chicago under traditional *forum non conveniens* consideration.

[8] 29 U.S.C. § 160(f):

"Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit

pliance" elsewhere can hardly be deemed to render the District of Columbia an improper forum for review. In a word, not a single consideration is suggested by the Company which would have supported a finding by the court below that the convenience of the parties in this appellate litigation would be better served by its transfer away from the circuit where the private and Government counsel who will handle these proceedings practice and reside. Far from abusing its discretion in refusing transfer under these circumstances, any other course by the court below would have run counter to basic principles of *forum non conveniens*.

Finally, an additional persuasive reason against transfer inheres in the Company's attempted use of *forum non conveniens* to obtain the benefit of *stare decisis* in the Seventh Circuit on a substantive issue dispositive of the proceedings. Understandably, the Company would prefer review in the court where *Goodman* may control the Section 9(h) issue involved in this case and result in a technical dismissal of the Labor Board's order against the Company. But courts have uniformly refused to use *forum non conveniens* to assist a party "seeking a forum offering particular advantages to himself," especially the advantage of substantive law. See *Convenient Forum v. Friendly Forum*, 10 Stan. L. Rev. 367, 368, 369, n. 10, and cases there cited.[7] Accordingly, all apart from the "convenience

wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, *or in the United States Court of Appeals for the District of Columbia* • • •" (emphasis supplied).

[7] Not only have courts refused to transfer to assist a defendant "shopping" for substantive law, but solicitude for plaintiff's choice of forum has even led courts to assure, before a removal is granted, that the plaintiff would not thereby be subjected to a loss in substantive rights. Thus, where removal is ordered, courts have held the law of the first forum to accompany the action to the second, in order to protect the plaintiff's

of the parties," upon which the Court of Appeals below correctly ruled and on which no significant question for review is presented, the Company cannot successfully attack the refusal of the court below to give it the benefit of review in the *Goodman* circuit on the pretext of *forum non conveniens*.

(b) *The Court Below Did Not Indulge in a "Probably Erroneous" Construction of 28 U.S.C. § 2112(a), and No Conflict Is Presented in That Court's Disposition of Transfer Motions under the Statute*

In addition to challenging the refusal of the court below to apply *forum non conveniens* in its favor, the Company seeks review of what it calls a "probably erroneous" construction of the transfer statute by the court below, and because of what it asserts is a "conflict" within that court in its disposition of transfer motions in similar cases. Neither ground has substance.

i. The Company makes the entirely gratuitous suggestion that the court below "may have considered that transfer should be denied because Congress intended that persons aggrieved by NLRB orders should have a right of review in the District of Columbia Circuit irrespective of the convenience of the parties and the interests of justice" (p. 10). But there is no basis for this straw man which the Company seeks to create. The court below never suggested any such basis for its decision; indeed, the Union never even made such an argument to the court

rights. The principle is applicable both in removal from state courts and in federal venue transfers. *See Headrick v. Atchison, Topeka and Santa Fe Ry. Co.*, 182 F. 2d 305, 309-310 (C.A. 10, 1950) and cases there cited; *Frechoux v. Lakes Brs. S.S. Co.*, 118 F. Supp. 231 (S.D.N.Y., 1953); *May v. The Steel Navigator*, 152 F. Supp. 254 (S.D.N.Y., 1957); *Greeley v. Gibraltar Enterprises*, 87 F. Supp. 419, 414 (D.C.N.M., 1949).

below.[8] What the Union did argue to the court below[9]—and what it contends here—is that there are strong reasons of policy for review in the District of Columbia, reasons recognized by Congress in a great number of statutes granting review in the District of Columbia irrespective of the non-residence of the parties. But it was never suggested that these reasons *preclude* transfer out of the District of Columbia and we agree with the Company's view that "there is no warrant for carving from the operation of the provision [28 U.S.C. § 2112(a)] an exception for the District of Columbia Circuit." Thus the supposed "construction" which the Company would bring here for interlocutory review was neither urged upon, nor adopted by, the court below.

ii. Nor is there any substance to the contention (p. 15) that there is "conflict" in the disposition by the court below of motions to transfer in similar cases. While the Company urges that in the earlier *Butcher Boy* case, unlike the instant case, there was a transfer to the Seventh Circuit of a petition for review filed by a union in the District of Columbia Circuit, the fact that *forum non conveniens* is applied in one Labor Board case and not in another is hardly an "inconsistency." *Forum non conveniens*, after all, looks to the facts of each particular case; it would hardly be consistent with *that* doctrine for the court below either to transfer all Labor Board cases to other circuits or to transfer none. As was specifically pointed out to the court below by the Union when the same contention was made there by the Company, the petitioning union in *Butcher Boy* was not really an aggrieved party entitled to file a re-

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[8] See Opposition to Motion of Kohler Company to Transfer Proceedings; Opposition to Petition for Rehearing En Banc (Tr. 23-43; 75-78).

[9] Opposition to Motion of Kohler Company to Transfer Proceedings, pp. 13-19 (Tr. 35-41).

view proceeding in the District of Columbia Circuit or elsewhere, for all the relief sought by that Union before the Labor Board had been granted it. Apparently all nine judges below accepted this distinction of the cases. Judge Fahy, who participated in the *Butcher Boy* panel, likewise participated in the instant panel ruling; moreover, in the face of the Company's suggested "conflict" of rulings, all three members of the *Butcher Boy* panel participated without dissent in the denial of the motion for reconsideration in the instant case. Under these circumstances there is no possible "conflict" within the circuit below over which review could be granted.

(c) *Petitioner Has Made No Showing under Rule 20 that Imperative Public Importance Justifies Interlocutory Grant of the Writ*

As an applicant for certiorari before judgment in the court of appeals, petitioner must meet the requirement of this Court's Rule 20 for "a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court." Petitioner has made no such showing nor purported to do so, never even referring to the Rule.[10] The questions the Company seeks to raise here at an interlocutory stage would certainly be available to it in the event that the Court of Appeals should uphold and enforce the Labor Board's order in this case. Indeed, in a related situation four members of this Court recently pointed out in a dictum the inappropriateness of

[10] Actually, there is some question whether as a matter of jurisdiction this Court has authority to grant statutory certiorari before judgment in the Court of Appeals in a case coming from an administrative agency, where no judicial judgment has yet been rendered. See Robertson & Kirkham (Wolfson & Kurland edition), *Jurisdiction of the Supreme Court of the United States* § 132.

interlocutory review of a lower court's refusal to transfer a case to another jurisdiction. See *LaBuy* v. *Howes Leather Company*, 352 U.S. 249, 264-265, dissenting opinion of Justices Brennan, Frankfurter, Burton and Harlan.

In this case the Company has unconscionably stalled appellate review and enforcement of the Labor Board's Order against it, six months having already been used in the Court of Appeals to delay appellate review on the *forum non conviens* question. We are confident that this Court will not want to encourage the use of certiorari as an interlocutory device by which a party to administrative proceedings can delay enforcement on the mere claim that a court of appeals has abused its transfer discretion under 28 U.S.C. 2112(a). Under these circumstances, interlocutory certiorari review is totally lacking in "imperative public importance"; what is actually of imperative importance is the speedy and orderly disposition of review and enforcement proceedings in the Court of Appeals. Should that disposition be unfavorable to the Company in this case, the grounds it urges here will be available to it as grounds for requesting this Court's review after final judgment.

Conclusion

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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No. 707

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In the Supreme Court of the United States

OCTOBER TERM, 1960

KOHLER COMPANY, PETITIONER

v.

LOCAL 833, UAW-AFL-CIO INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

and

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

No opinion was rendered by the court of appeals. The Decision and Order of the National Labor Relations Board are reported in 128 NLRB No. 122.

JURISDICTION

The order of the court of appeals was entered on November 23, 1960, and a petition for rehearing *en banc*, filed by petitioner, was denied on January 9, 1961 (Pet. 1a-2a). The petition for a writ of certiorari was filed on February 8, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Petitions to review an order of the National Labor Relations Board were filed in two courts of appeals 35 minutes apart on the same day. The Board filed the record in the court in which the first petition had been filed, which concededly gave that court jurisdiction. The question presented is whether that court abused its discretion in denying a motion to transfer the case to the other circuit.

STATUTES INVOLVED

The relevant statutory provisions are set forth at pp. 2-5 of the Petition.

STATEMENT

On August 26, 1960, the Board issued its Decision and Order (128 NLRB No. 122, 46 LRRM 1389), finding that petitioner Kohler Company had engaged in certain unfair labor practices but not in others. The Board found that the Company had refused to bargain in good faith with the respondent Union,[1] in

[1] Local 833, UAW-AFL-CIO.

violation of Section 8(a)(5) of the National Labor Relations Act, by refusing to furnish wage information to the Union for the purposes of collective bargaining, unilaterally putting into effect wage increases after the commencement of a strike, and discharging certain striking employees and transferring certain nonstriking employees without notification or consultation with the Union. In addition, the Board found that the Company violated Section 8(a)(3) by discriminating against certain employees and thereafter failing to offer them reinstatement, and also interfered with, restrained, and coerced its employees in violation of Section 8(a)(1) of the Act. The Board found, however, that the Company had not failed to bargain in good faith prior to the strike, and that the strike was thus caused by a dispute over economic matters rather than by unfair labor practices. The Board also found that 77 striking employees had been discharged because of their misconduct during the strike and were therefore not entitled to reinstatement. The Board's order, *inter alia*, required the Company to bargain in good faith with the Union, to furnish the Union with various wage data, and to reinstate the employees unlawfully discriminated against and, under certain conditions, to award them back pay. The order further provided for a dismissal of the complaint with respect to the action not found to be unlawful.

The Board's Decision and Order were issued on August 26, 1960, at approximately 10:30 a.m., East-

ern Daylight Saving Time.[2] Five minutes later, the Union filed, pursuant to Section 10(f) of the Act, in the United States Court of Appeals for the District of Columbia Circuit (Case No. 15,961), a petition to review and set aside those portions of the Board's order adverse to it (Pet. 2a-4a). Thirty-five minutes thereafter (at 11:10 a.m., Eastern Daylight Saving Time), the Company filed a petition in the United States Court of Appeals for the Seventh Circuit (Case No. 13,120), to review and set aside those portions of the Board's order adverse to it (Pet. 11a-14a, 16a).

By letter dated October 12, 1960, the General Counsel of the Board notified the Clerk of the Court of Appeals for the District of Columbia Circuit and all parties that the Board had determined that the petition filed in that court "was the one which was first filed within the meaning of Section 2112(a) of 28 U.S.C." and, accordingly, that the certified list of the material comprising the record would be filed in that court (Pet. 8a-9a). The Board thereupon filed in the Court of Appeals for the District of Columbia Circuit the certified list, an answer denying the allegations of error in the Union's petition to review, and a cross-petition for enforcement of its order against the

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[2] On August 25, 1960, the Board telegraphically advised all parties to the proceeding that the Board's decision and order "shall be simultaneously issued by hand in Washington, D.C. to the parties and the press on Friday, August 26, 1960, at 10:30 a.m." At approximately 10:30 a.m., Eastern Daylight Saving Time, on August 26, 1960, the Executive Secretary of the Board, in his office in Washington, D.C., physically handed representatives of both the Company and the Union copies of the Board's Decision and Order.

Company (Case No. 16,031) (Pet. 4a-7a). The Board also filed a motion in the Seventh Circuit that the Company's petition be transferred to the District of Columbia Circuit pursuant to 28 U.S.C. 2112(a) (Pet. 16a).

On October 24, 1960, the Company moved the Court of Appeals for the District of Columbia Circuit: (a) to consolidate Cases No. 15,961 and 16,031, (b) for leave to intervene in Case No. 15,961; and (c) to transfer both proceedings to the Court of Appeals for the Seventh Circuit. On November 23, 1960, the court granted the Company's motions to consolidate and for leave to intervene, but denied the motion to transfer the proceedings (Pet. 1a, 10a). On December 7, 1960, the Company filed a petition for rehearing *en banc* of the court's denial of its motion to transfer (Pet. 10a). On January 9, 1961, the court denied the petition for rehearing *en banc* (Pet. 2a). On January 18, 1961, the Court of Appeals for the Seventh Circuit transferred Case No. 13,120 to the Court of Appeals for the District of Columbia Circuit, pursuant to 28 U.S.C. 2112(a) (Pet. 16a-17a).

ARGUMENT

The petitioner seeks review of an interlocutory order of the Court of Appeals for the District of Columbia Circuit denying a motion to transfer to the Seventh Circuit proceedings to review an order of the National Labor Relations Board. It does not deny the jurisdiction of the court below; its sole argument is that, in the circumstances of this case, the court should have exercised its discretion in favor of, in-

stead of against, transfer. We submit that the petitioner has not shown that the court below abused its discretion in refusing to transfer. In any event, the correctness of the court's refusal to transfer this particular case presents no question warranting review by this Court—especially where, as here, such review is sought before the court of appeals has finally decided the case.

1. Section 10(f) of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. 151, 160, gives any "person aggrieved by a final order of the Board" the right to obtain review thereof in either the court of appeals in the circuit where the unfair labor practices were committed or where the person resides or transacts business, or in the District of Columbia Circuit (where the Board has its main office). Two persons were aggrieved by the Board's order in this case—the Company and the Union—and each petitioned for review in a different circuit. Title 28 U.S.C. 2112(a) provides that, where multiple petitions are filed, the agency "shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted", and the other courts shall transfer their proceedings to the court "in which the record has been filed." The statute further provides, however, that: "For the convenience of the parties in the interest of justice such court may thereafter transfer all the proceedings with respect to such order to any other court of appeals."

The Board filed the record in the District of Columbia Circuit because the petition to review had been

filed there 35 minutes before the petition had been filed in the Seventh Circuit. Regardless of whether the Board was required to file in the District of Columbia Circuit (see *infra*, pp. 9-11), the petitioner does not, and cannot, deny that the court below thereupon acquired jurisdiction. For Sections 10(e) and 10(f) of the National Labor Relations Act (29 U.S.C. 160(e), (f)) provide that the court of appeals acquires "jurisdiction of the [review] proceeding" upon the filing of the record. The only question before this Court, therefore, is whether the court below abused its discretion, invoked by the petitioner under Section 2112(a), in refusing to transfer.

We submit that the court of appeals acted well within its discretion in declining to transfer the case. The primary factors for transfer urged by petitioner (Pet. 11) are that the Union and the Company reside within the Seventh Circuit; that the employees involved work and reside there; that the alleged unfair labor practices occurred there; and that principal counsel for the Company resides and practices there. But these factors have little significance in Board review and enforcement proceedings, since the court of appeals is called upon to determine the validity of the Board's order upon the basis of a record that has already been completed; the court itself does not receive evidence or hear witnesses. On the other hand, the Union was aggrieved by the Board's order in a substantial way and its petition brought up an important portion of the case for review (see pp. 3-4,

supra). Section 10(f) of the Act gave it the right to obtain review of its contentions in the District of Columbia Circuit. Appellate counsel for all parties have their offices in the District of Columbia. In these circumstances, the court below was justified in concluding that the reasons for retaining jurisdiction of the case overbalanced, or at least equaled, those for transferring the case to another court. To put it differently, petitioner had not made a sufficient showing that the transfer would be "[f]or the convenience of the parties in the interest of justice" to warrant overturning the Union's statutory right to obtain review in the District of Columbia Circuit.

2. There is no merit to petitioner's contention (Pet. 9, 12-14) that the refusal of the court below to transfer the case to the Seventh Circuit rested on the view that the Court of Appeals for the District of Columbia Circuit does not have the same power to transfer as do the other circuits. There is nothing in the brief orders of the court below that supports this contention; on the contrary, the contention is directly refuted by the recent order of that court granting a motion to transfer in the *Butcher Boy Refrigerator Door Company* case, where petitions to review the same Board order were filed in both the District of Columbia and in the Seventh Circuits (Pet. 20a-21a).

Nor is there any warrant for petitioner's suggestion (Pet. 15) that an intra-circuit conflict exists within the court below on this issue. The argument is predicated upon the fact that the court granted the

motion to transfer in *Butcher Boy*, but denied it in a later case (*Gulf Bottlers, Inc.*) and in the instant case. But all of the judges in the Circuit passed on and denied a petition for rehearing *en banc* in this case, which was predicated on the alleged conflict with *Butcher Boy* (Pet. 2a). Moreover, an examination of the three cases clearly reveals that the different results are attributable, not to a difference in principle, but to the particular facts of each case.[4]

3. This case does not present the problem which the government discussed in its memorandum in *Kerr Steamship Co.* v. *United States*, No. 623, this Term, pending on petition for certiorari. That case, and a related case pending before the District of Columbia Circuit (*Montship Lines, Limited, et al.* v. *Federal Maritime Board and United States*, No. 15783, et al.), involved petitions to review an order

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[4] In *Butcher Boy*, the Board found that the employer violated Section 8(a) (5) and (3) of the Act in certain respects but not in others, and issued a broad remedial order (127 NLRB No. 160, 46 LRRM 1192). The union's petition to review in the District of Columbia Circuit merely challenged the Board's failure to find the additional violations of those sections, which findings could not have affected the scope of the Board's order. In these circumstances, the court below could well have thought that the part of the case initiated before it was too insubstantial to warrant it in retaining jurisdiction. On the other hand, here and in *Gulf Bottlers* (where the union's petition to review challenged the Board's failure to find that the employer had "dominated," rather than merely "assisted," an employee association, 127 NLRB No. 107, 46 LRRM 1097), there was more justification for a retention of the case, since the issues raised by the union's petition to review could have a substantial bearing on the ultimate scope of the Board's order.

of the Federal Maritime Board, which petitions had been filed in different circuits on the same day without notation in either circuit of the time of filing. In the light of that circumstance—an inability to ascertain from the record which petition was filed first—the Government in *Kerr* and *Montship* expressed the view that Section 2112(a) was inapplicable where two petitions were filed the same day. In the present case, where it is clear from the clerks' notation on each petition that the petition in the District of Columbia Circuit was filed first (as the company concedes), the government is of the view that Section 2112(a) applies, and indeed all the parties to this litigation have so understood from its inception. See *Louisville* v. *Savings Bank*, 104 U.S. 469, 474; *Tower* v. *Stimpson*, 175 Fed. 130, 130-131 (D. Mass.); *Matter of Joseph Richardson*, 2 Story 571; Ann. Cas. 1914 C 95, 97. But even if that Section were inapplicable, under controlling principles antedating Section 2112(a) the Board had authority to file the record in the court below, and that court had jurisdiction to entertain the case and to refuse to transfer it. See *Columbia Oil & Gasoline Corp.* v. *Securities and Exchange Commission*, 134 F. 2d 265, 266 (C.A. 3), and the numerous cases there cited. The Company here, seeking transfer under the statute, is in no position to urge its inapplicability; for if the statute is inapplicable, the court below did not err in refusing a transfer sought thereunder. Finally, even had transfer been sought below not under the statute but rather under inherent equity powers, the same discretionary con-

siderations of convenience would have impelled the same denial of transfer, and there would still be no warrant for review here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court of the United States

BRIEF FOR PETITIONER
IN REPLY TO OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 707

KOHLER CO., *Petitioner*,

v.

LOCAL 833, UAW-AFL-CIO, INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,

and

NATIONAL LABOR RELATIONS BOARD, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER IN REPLY TO OPPOSITION

It was pointed out in the Petition that the Court of Appeals may have rested its denial of the Motion to Transfer either on *forum non conveniens* grounds or on the ground that Section 10(f) of the NLRA gives persons aggrieved

by NLRB orders a right of review in the District of Columbia Circuit irrespective of the convenience of the parties. It is our belief that the factors favoring retention of the case in the District of Columbia are so insubstantial that the decision of the Court of Appeals cannot have been based on an appraisal of the convenience of the parties. In consequence, we believe that the Court's decision rested upon the second ground stated above, namely, that the Union has a statutory right of review in the District of Columbia Circuit which is unaffected by *forum non conveniens* considerations. Apparently, the Board and the Union recognize that, if the Court of Appeals did decide the case on the ground suggested by petitioner, the issues presented by the Petition are of vital importance in the administration of the review and enforcement provisions of the National Labor Relations Act (29 U.S.C. § 160 (e) and (f)) and of 28 U.S.C. § 2112 (a). In consequence, the respondents both insist that the denial of the Motion was based on *forum non conveniens* grounds. It is apparent that respondents hope, by this contention, to minimize the importance of the questions presented by the Petition.

We point out in the Petition (Pet. 9-10), however, that the technique which has been devised by unions aggrieved by NLRB orders for vesting 2112 (a) jurisdiction in the District of Columbia Circuit lends peculiar importance to the criteria which that Court has developed for application of the Section. Here, both the Union and the Board concede that the only "convenience" factors favoring retention of the case in the District of Columbia are the location here of the offices of appellate counsel for the Union, associated counsel for the Company, and the Associate General Counsel of the Board who has general supervision over proceedings to enforce NLRB orders. Obviously, the location of the Board's Associate General Counsel does not change from case to case. In consequence, if this is a factor to be considered in balancing the convenience of the

parties,—which we doubt*—it will always weigh in favor of the District of Columbia. Moreover, because the Board's offices are located in the District of Columbia, it is the customary, if not invariable, practice of persons involved in proceedings before the Board to retain associate District of Columbia counsel.** Thus, of the factors on which the Board and the Union rely, only the fact that the Union's principal appellate counsel maintains offices here distinguishes this case from virtually every other NLRB review proceeding. A holding, therefore, that the District of Columbia Circuit is a permissibly "convenient" forum for this case means that persons desiring to maneuver agency review proceedings into this Circuit can do so by the simple expedient of retaining appellate counsel who practice here. Neither the terms nor the legislative history of 28 U.S.C. § 2112 (a) affords even an iota of support for such a construction of the Section.

We submit that if this is, indeed, the convenience criterion which the District of Columbia Circuit found to be controlling in the *Kohler* case and in the previous *Gulf Bottlers* case (Pet. 9, Notes 1 and 2), then prompt review and correction by this Court are im rative. We further submit that the insubstantiality of the *forum non conveniens* factors relied on by the Union and the Board to justify the decision of the Court of Appeals demonstrate the improbability that that Court decided the Motion on those grounds.

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* The purpose of 28 U.S.C. § 2112 (a) was in part to prevent forum shopping by Government agencies. It is for this reason that agencies are required to file their record in the Court first acquiring jurisdiction over a proceeding. To recognize the convenience of Government counsel as a factor in making the forum selection under 2112 (a) seems inconsistent with this Congressional purpose.

** We believe this practice to be sufficiently well known—not only as it relates to NLRB proceedings but as it relates to other Government agencies and boards having their principal office in the District of Columbia—to come within the scope of judicial notice.

The *Butcher Boy Refrigerator Door Company* case—in which the District of Columbia Circuit did grant a Motion to Transfer—does not help the respondents. If, as the Board maintains, the Union was not substantially aggrieved by the order of the Board in *Butcher Boy*, the allowance of the Motion there is the equivalent of a dismissal of the appeal. As such, it is entirely consistent with our view that the Court of Appeals does not consider itself bound by *forum non conveniens* considerations when applying 28 U.S.C. § 2112 (a) to cases arising under Section 10 (f) of the NLRA. If, on the other hand, the Union was truly aggrieved in *Butcher Boy*, then the case conflicts directly with the later *Kohler* and *Gulf Bottlers* cases in which motions to transfer were denied.

Respondent Union makes much of the argument that a plaintiff is normally entitled to the benefit of his own choice of forum. The point has no relevance here. To the extent that persons aggrieved by NLRB orders can be analogized to plaintiffs, there are two "plaintiffs" in this case; the Union in the D. C. Circuit and the Company in the Seventh. Both cannot be accommodated in their choice of forum. It was to guide the Courts in determining which of two "plaintiffs" should lose the benefit of his choice that Congress enacted 28 U.S.C. § 2112 (a).

The respondent Union further contends that denial of transfer was justified here because of the existence of a precedent in the Seventh Circuit which is unfavorable to the Union.*** The argument assumes that there exists in the 2112 (a) Court something akin to certiorari jurisdiction under which that Court determines preliminarily whether the transferee court would dispose of the case properly. It is obvious that there is no room for such a function where courts of equal dignity are charged with equal responsibility for the development of the law under a unitary statute.

*** Goodman Co. v. NLRB, 234 F. 2d 775; *cert. den., sub nom.* United Electrical Workers v. Goodman Co., 352 U. S. 872.

CONCLUSION

The procedure employed in the *Gulf Bottlers, Butcher Boy,* and *Kohler* cases creates a vital role for the District of Columbia Circuit under 28 U.S.C. § 2112 (a),—particularly as that Section interrelates with Section 10 (f) of the National Labor Relations Act. Whatever the ground of decision, it is apparent that the Court of Appeals presently construes 28 U.S.C. § 2112 (a) and Section 10 (f) to permit retention of cases in the District of Columbia on a minimal showing of nexus between the case and this jurisdiction. This can only encourage the initiation of review proceedings in the District of Columbia for just such reasons as the existence of unfavorable precedents in the Circuit of origin. We believe that such a construction of 28 U.S.C. § 2112 (a) and Section 10 (f) presents for consideration by this Court questions of sufficient importance in the administration of both Sections to justify the exercise of certiorari jurisdiction.

Respectfully submitted,

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